United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

In The

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 19,270

HAROLD S. CROSS,

Appellant

47

v.

UNITED STATES OF AMERICA,

Appellee

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

1. Was it error to admit evidence that the defendant, on trial for armed robbery, had in the past beaten two women, and that another witness had been arrested while a passenger in defendant's car?

2. When evidence has been admitted of prior crimes committed by the defendant, must the judge charge the jury that such evidence has been admitted for a limited purpose, and may not be considered as evidence of his propensity to commit the crime of which he is charged? Is this charge normally required only if requested by the defendant? If so, was it plain error not to give it here, despite the lack of a request therefor?

3. When a witness' trial testimony has been impeached by showing that she has made prior statements inconsistent with that testimony, may the government introduce testimony by another witness that he had "read where she had given" a statement consistent with the trial testimony?

4. When the government attorney, in his summation, misstates the evidence on three critical matters, each time to the defendant's disadvantage, is there prejudicial error?

5. When a professed accomplice admits having received a promise of consideration on her own indictment if she will testify against the defendant, may the judge refuse to charge that the jury should consider this promise in weighing the accomplice's credibility?

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JURISDICTIONAL STATEMENT

The appellant was tried and convicted of robbery in violation of 22 D. C. Code §2901. Judgment was entered on March 8,1965. On March 10, appellant submitted an application for leave to proceed on appeal without prepayment of costs, which was granted by the District Court on March 18. The undersigned was appointed to represent appellant on this appeal by an order of this Court dated April 27, 1965. This Court has jurisdiction under 28 U.S.C. §1291.

STATEMENT

This is an appeal from the second trial of the defendant, Harold S. Cross, on an indictment charging that he and John L. Jackson robbed a church rectory. Cross' and Jackson's first convictions were reversed because the district court had put them on trial on this and an unrelated charge, despite their request for a severance of the charges. Cross v. United States, _____ U.S. App. D. C. _____, 335 F.2d 987 (1964).

On retrial, Cross and Jackson were tried separately. At Cross' retrial, which is the subject of this appeal, the government proved, and the defendant did not dispute, that the Church of the Incarnation was robbed by two masked men on the night of February 23, 1962. The sole dispute was whether the defendant, Cross, was one of the two robbers.

I. The Eyewitnesses

The government introduced three witnesses who identified Cross as one of the robbers: a priest residing at the church rectory which was robbed, and two women who claim to have been accomplices in the perpetration of the robbery.

A. Father Cantwell

The priest, Father Cantwell, testified that the robbers' faces were completely covered by stocking masks and thus he saw no facial characteristics (Tr. 82-83), but that he could nonetheless identify Cross as one of the robbers on the basis of

"the shape of the head", "the gait", "the weight", "and so on" (Tr. 86). [At the close of the evidence, Judge Youngdahl urged the government attorney not to rely on the priest's identification in his closing argument, because it was so weak (Tr. 284-85). The government attorney did rely on it, however (Tr. 294, 297), and Judge Youngdahl in his charge reminded the jury of the limited basis for the priest's identification (Tr. 346).]

B. Hazeltine Price Peyton

The first of the two "accomplices", Hazeltine Price Peyton, testified that on the night of the robbery she went in a car with Cross, Jackson and Kay Foster to the vicinity of the Church of the Incarnation; that Cross and Jackson left the car for twenty to thirty minutes; that they returned carrying money boxes and a watch; that they drove to a tourist home, where the fruits of the crime were divided, the two women each receiving a portion of the money; that they then drove to a second tourist home where they spent the night; that in the morning they drove to Key Bridge and threw the money boxes into the river; and that later that day they recovered the boxes, drove to Virginia, and dropped them into a sewer (Tr.98-109).

On cross-examination, the defense established that Mrs. Peyton has a long criminal record (Tr. 133-34); that she was

arrested and charged with having been a participant in the robbery, but was not indicted (Tr. 132), and that she was under the influence of narcotics on the night of the robbery (Tr. 112). Defense counsel also introduced into evidence an affidavit, which Mrs. Peyton admitted having signed (Tr. 115), in which she said:

> "I Hazeltine Price was under the influence of narcotics on the night of February 23, 1962, and cannot truthfully say that I can remember anything concerning the robbery of the Church of the Incrnation, and did not go to any tourist home with the defendants, John L. Jackson or Harold S. Cross that night or have never been in the tourist home of Joseph Chase and Edna Burton.
>
> "The night of February 23, 1962, I was never in the vicinity of the Church of the Incarnation at 880 Eastern Avenue, Northeast, with the defendants John L. Jackson or Harold S. Cross or Miss Kay M. Foster." (Tr. 120-21).

Mrs. Peyton testified that she executed this affidavit because in fear of bodily harm from the defendant (Tr. 116,120,137-38). She denied having told her boyfriend, Floyd McIntosh, that the crime was committed by two other men (Tr. 129-31). She also denied having affirmed the affidavit, at a later date, to an attorney (Mr. Lefstein, now an Assistant United States Attorney) and a law student (Mr. Banta). (Tr. 131-32).

On redirect, the government attorney sought to bolster Mrs. Peyton's testimony by demonstrating that she had previously testified consistently with her testimony at this trial, and contrary to the affidavit. Judge Youngdahl refused to permit

this testimony (Tr. 138-39).

The defense sought further to impeach Mrs. Peyton's testimony through a number of witnesses. Floyd McIntosh testifed that Mrs. Peyton told him that she had not participated in the robbery, and that the robbery had been committed by two men named Frenchie and Mike (Tr. 218). Two witnesses testified that they saw or were with Mrs. Peyton at the time she prepared the affidavit, and that she had exhibited no sign of being in fear (Tr. 198-200, 257). Messrs. Lefstein and Banta testified that they had interviewed Mrs. Peyton in D. C. Jail, and that she had told them that the contents of the affidavit were true (Tr. 206, 213).

On cross-examination of Mr. Lefstein, the court permitted the following interrogation, over objection of defense counsel:

> "Q. Now Mr. Lefstein, when you went to the jail were you aware of the fact that Mrs. Peyton had given a statement to the authorities which was wholly contradictory and inconsistent with the affidavit ...
>
> "A. I had read where she had given such a statement." (Tr. 207-208)

The government thus succeeded in getting before the jury, through its cross-examination of Mr. Lefstein, the information which the Court had refused to permit on redirect examination of Mrs. Peyton: that she had made prior statements inconsistent with the affidavit. (The admission of this testimony is one

of the errors assigned on this appeal, and is argued as Point II in this brief).

C. Kay Foster

The second of the "accomplices" was Kay Foster. She was, at the time of trial, undergoing psychiatric examination at Saint Elizabeth's Hospital to determine whether she was competent to stand trial on a narcotics charge. The defense challenged her competency as a witness, and the Court ordered Dr. Lanham of the Legal Psychiatric Service to interview her (Tr. 20). Dr. Lanham testified, out of the presence of the jury, that in his opinion she was competent to testify (Tr. 126). Upon further examination, he testified that there was evidence that she was suffering from an underlying personality disorder; that this disorder might affect her truth-telling ability or her tendency to tell the truth; that people with such disorders "have a tendency to fabricate or prevaricate"; and that "the tendency with these people to manipulate, and so forth,is a little stronger"than in most people. (Tr. 126-28).

The Court ruled that Miss Foster was competent to testify (Tr. 128).

Miss Foster gave a version of events on the night of the robbery somewhat similar to that of Mrs. Peyton, although there

were several major deviations in detail. [1] On cross-examination, she admitted having a long criminal record (Tr. 159-60); that she had been under the influence of narcotics on the night of the robbery (Tr. 156-57); and that she had been arrested for the robbery (Tr. 158). Defense counsel then asked:

> "Q. Did they tell you if you cooperated with them and testified against Mr. Cross that they wouldn't prosecute the charges against you?
>
> "A. They said they would see what they could do.
>
> "Q. They did offer to help you if you would testify?
>
> "A. Yes." (Tr. 158)

When it came time for the judge's charge, defense counsel requested the Court to charge the jury that a promise of favor or consideration to an arrested accomplice should be weighed in determining credibility. The Court refused, stating that "That is a matter of argument" (Tr. 353-54). (The failure to give the requested charge is assigned as one of the errors

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[1] Miss Foster testified that they discussed the planned robbery while driving to the Church (Tr. 143); Mrs Peyton testified that the only discussion in the car was "They just told us to stay in the car" (Tr. 100). Mrs. Peyton had testified that they drove to Key Bridge and disposed of the money boxes after their stay at the second tourist home (Tr. 106-07); Miss Foster testified it was before the stay at the second tourist home (Tr. 157).

on this appeal, and is argued as Point IV of the brief).

II. The Government's "Corroborating" Evidence

The government introduced no evidence -- apart from the eye-witness identifications of Father Cantwell, Mrs. Peyton and Miss Foster -- tending to show that Cross was one of the robbers. In an effort to bolster the testimony of Mrs. Peyton and Miss Foster, it introduced testimony of the two proprietors of the second tourist home described in their testimony. These two proprietors testified that, on the night of the robbery, Cross, Jackson, Mrs. Peyton and Miss Foster visited their tourist home (Tr. 170-71, 180-82). They admitted, however, that Cross' name does not appear on their register for that night, and that they are required by law to maintain the register with the names of all guests (Tr. 175, 183-84). The government also introduced the testimony of a detective on a robbery squad that Miss Foster led him to a sewer in Virginia where one of the stolen money boxes was found (Tr. 186-87).

III. The Other Defense Evidence

In addition to the evidence introduced to impeach Mrs. Peyton, described above, the defense introduced the testimony of an acquaintance of Defendant Cross, who testified that on the night of the robbery he was with Cross at the latter's home until 11 p. m. (Tr. 276). (This contradicted the testimony of Mrs.

Peyton and Miss Foster that they were driving with Cross and Jackson for a considerable period before 11 p. m.). The defense also introduced the testimony of the proprietor of the first tourist home described in Mrs. Peyton's and Miss Foster's testimony. She testified that her records did not show that either Cross or Jackson were there on the night of the robbery nor did they show that any group of four checked in at any time that night (Tr. 259-61).

IV. The Government's Closing Argument

In his closing argument, counsel for the government misrepresented the evidence in the record in two important respects and supplemented it in another.

Government counsel said (Tr. 300):

> "Now it may be argued to you that some sort of promise was made or implied to either Kay Foster or Hazeltine Price. I asked them directly, and without equivocation at all, whether or not any promise of any kind was made to them by the police, by the law enforcement authorities, by me or by anyone from my office, and they said no promises.
>
> "And ladies and gentlemen, you can believe that testimony. It wasn't contradicted, it wasn't impeached at all. No promises ..." (Tr. 300).

(As already noted, Kay Foster testified that she did receive a promise of consideration if she testified against Cross(Tr.158).

Government counsel said (Tr. 297):

> "Mrs. Burton and Mr. Chase of the tourist home also testified that in the night in question, the early morning hours of February 24, this defendant and John L. Jackson and two women came in and stayed for a period of time and they had observed their records to determine whether or not that was so. They verified it before their testimony."

(As noted above, Mrs. Burton and Chase actually admitted, on cross-examination, that their records did not show that Cross had been there on the night of the robbery. Tr. 175, 183-84. They did not testify, one way or the other as to what their records showed regarding Jackson, Mrs. Peyton and Miss Foster).

Government counsel described the Peyton affidavit as in "obvious contradiction" with prior statements of Mrs. Peyton (Tr. 301). (As already noted, the Court had refused to permit the government to introduce evidence of those prior statements (Tr. 138-39), and the only reference in the testimony was Mr. Lefstein's statement that he had "read where she had given such a statement" (Tr. 207-08)).

(Government counsel's misstatements are assigned as one of the errors on this appeal, and are argued as Point III in this brief.)

V. References to Defendant's Bad Character and Commission of Other Crimes

Although the defendant did not take the stand, or put his

good character in issue, the government managed to get before the jury evidence of prior crimes committed by him. In questioning Mrs. Peyton as to the basis for her fear of Cross, government counsel elicited the response that in the past Cross had beaten her and Miss Foster (Tr. 137), and, by a series of leading questions, got her to agree that she feared for her life (Tr. 137-38). Defendant objected to this line of questioning (Tr. 173).

In his closing argument, government counsel repeated this testimony, adding his own appraisal that to fear the defendant was "justifiable".

> "And why did she sign it? You heard her testimony. He threatened her. I was in fear of my life, he had already beat me up once, he had beaten up Kay Foster, and I was afraid of him. And justifiably so, ladies and gentlemen." (Tr. 301)

In cross-examining defense witness Floyd McIntosh, government counsel elicited testimony that McIntosh had been arrested in North Carolina while a passenger in Cross' car (Tr. 226). Defendant objected to this line of questioning (Tr. 226).

(The introduction of evidence that Cross had committed other crimes, and the Court's failure to charge as to the limited purpose (if any) for which this evidence of prior crimes was admitted, are assigned as errors, and are argued together as Point I in this brief.)

VI. The Verdict and Sentence

The jury found the defendant guilty. The Court sentenced the defendant to 4 to 12 years, the sentence to run concurrently with his sentence in No. 293-64 (pending on appeal as No. 19,124).

STATEMENT OF POINTS, AND PORTIONS OF THE TRANSCRIPT WHICH APPELLANT DESIRES THE COURT TO READ IN CONNECTION WITH EACH POINT.

1. The district court erred in permitting evidence that defendant is a person of bad character and, having permitted such evidence, in failing to charge as to the limited purpose for which it was admitted. (Tr. 114-116, 120-22, 137-38, 226-27, 301, 302-03).

2. The district court erred in permitting hearsay testimony that Mrs. Peyton had made prior statements consistent with her testimony in this case. (Tr. 115, 120-122, 138-39, 207-210, 301).

3. Prejudicial error occurred when government counsel, in his summation, misstated the evidence in the record in three critical respects to the disadvantage of the defendant. (Tr. 138-139, 158, 174-175, 183-184, 207-210, 297-298, 300, 301, 308-309, 317, 353-354).

4. The district court erred in refusing to charge that the jury should consider, in weighing the credibility of accomplice testimony, that an accomplice has received a promise of consideration on his own indictment if he will testify against the defendant. (Tr. 158, 300, 343-345, 353-354).

SUMMARY OF ARGUMENT

This was an extremely close case. The government's two principal witnesses were professed accomplices to the crime. Their testimony was impeached by several witnesses, and their credibility was seriously attacked. Indeed, one of them admitted having previously signed an affidavit flatly contradictory to her trial testimony. The closeness of the case must be borne in mind in evaluating the prejudicial effect of the errors which occurred.

1. The district court erred in permitting the government to introduce evidence that defendant was a person of bad character who had committed other violent crimes in the past.

The defendant did not take the stand,nor did he put his good character in issue. In these circumstances, it is well established that the government may not attack his character or show that he has committed other crimes in the past. Michelson v. United States, 335 U.S. 469, 475-76 (1948). Yet the government was permitted to introduce evidence over defendant's objection that defendant had beaten two women in the past, and that a witness had been arrested while a passenger in defendant's car. The latter evidence was totally irrelevant to any issue in this case, and its admission was

undeniably error. The testimony regarding the beatings was peripherally relevant -- to bolster a government witness' explanation that she had signed an impeaching affidavit because in fear of defendant -- but its admission was nonetheless error for three reasons. Relevant evidence of prior criminal acts of the defendant is inadmissible when, as here, (1) it is merely cumulative and therefore not "necessary and important to the proof of the government's case" (Frank v. United States, 104 U.S. App. D.C. 384, 262 F.2d 695,697 (1958)); (2) it goes only to a peripheral question, not to proof of one of the elements of the crime itself, and its prejudicial effect outweighs its probative value (Harper v. United States, 99 U.S. App. D.C. 324, 239 F.2d 945, 946 (1956)); and (3) it relates to a crime for which the defendant was neither arrested nor convicted, and is uncorroborated (Hansford v. United States, 112 U.S. App. D.C. 359, 303 F.2d 219 (1962)).

In any event, even if the evidence had been properly admitted, it was error for the district judge not to charge the jury on the limited purpose of its admission. A charge explaining the limited purpose for which evidence of prior crimes has been received and cautioning that it may not be considered as evidence of the defendant's propensity to commit the crime of which he is charged, is mandatory and the

failure so to charge is reversible error if prejudicial. Wharton's Criminal Evidence, §248, p.566. Defense counsel did not specifically request the charge (although he had objected to the admission of the evidence). But the failure to give the charge in the circumstances of this case was "plain error" requiring reversal, even if (contrary to the rule in some jurisdictions) the Court's obligation to give the charge is normally dependent upon request of counsel.

2. The district court erred in permitting the government to smuggle into the record evidence that one of its key witnesses had made prior statements consistent with her trial testimony. The testimony of Mrs. Peyton had been impeached by her admission, on cross examination, that she had signed an affidavit flatly contradictory to her trial testimony. The government sought to bolster her trial testimony by showing that she had made prior consistent statements. The trial judge ruled this evidence inadmissible. His ruling was correct. 3 Wharton's Criminal Evidence, §969, p. 430. Later in the trial, however, government counsel elicited testimony from another witness, over defendant's objection, that the witness had "read where she had given such a statement." The admission of this evidence was doubly erroneous: first, because it violated the rule against

admissibility of prior consistent statements; and second, because in the form given it was hearsay. Defendant was clearly prejudiced by this evidence. Mrs. Peyton's testimony had been impeached by several witnesses; the jury had to decide which of her stories -- the affidavit or the trial testimony -- to believe; and they could not help but be influenced by the knowledge that she had made prior statements consistent with her trial testimony.

3. Prejudicial error occurred when government counsel, in his summation, misstated the evidence in the record in three critical respects to the disadvantage of the defendant.

Government counsel, in his summation, misstated the evidence in three critical respects. First, he stated that both of the government's key witnesses -- Mrs. Peyton and Miss Foster -- had unequivocally denied receiving any promises of consideration on their own indictments if they testified against defendant. But Miss Foster testified that she did receive a promise of consideration if she would testify against defendant.

Second, government counsel stated that the testimony of the co-proprietors of a tourist home, placing defendant there on the night of the robbery with Mrs. Peyton and Miss Foster,

was corroborated by the tourist homes guest records. In fact, however, the co-proprietors had testified that their records do not show defendant to have been there.

Third, government counsel stated that Mrs. Peyton's affidavit exculpating defendant was in "obvious contradiction" with prior statements which she had made. But the court had ruled these prior statements inadmissible, and the only evidence in the record was the hearsay testimony of another witness that he had "read where she had given such a statement." We do not charge that government counsel intentionally misstated the evidence. The issue here, however, is not the good faith of the prosecutor, but the fairness of the trial. Defendant was clearly prejudiced by the confusion of the jury which inevitably must have resulted from these misstatements. In a case as "paper-thin" as this one was, the misstatements require reversal. Jones v. United States, ___U.S. App. D.C. ___, 338 F.2d 553 (1964).

4. The district court erred in refusing to charge that the jury should consider in weighing the credibility of accomplice testimony, that an accomplice has received a promise of consideration on his own indictment if he will testify against the defendant.

The testimony of an accomplice is considered highly suspect, because he "is in a position to gain favors from the government by his testimony." Lyda v. United States, 321 F.2d 788, 794 (9th Cir. 1963). When an accomplice testifies, therefore, the judge is required to charge the jury that such testimony is suspect and that it must be acted upon with great caution.

In this case, the judge charged the jury that accomplice testimony must be acted upon with caution, albeit so perfunctorily that government counsel did not even hear it. (Tr. 353). But the judge did not explain to the jury why such evidence is suspect. It is doubtful that a jury could properly apply the cautionary charge unless it knows that the danger in such testimony is the accomplice's motivation to preserve his own freedom at the expense of the defendant.

Here, one accomplice admitted having received a promise of consideration on her own indictment if she would testify against defendant. Defense counsel requested a charge that this promise be weighed in determining the accomplice's credibility. The judge refused, stating that this was a matter for "argument."

The judge's ruling was error. The jury must consider such evidence in weighing an accomplice's credibility. 2

Wharton's Criminal Evidence, §445, pp. 223-24. The failure to instruct it to do so here was prejudicial to the defendant.

5. We have argued that each of the errors at this trial, considered separately, was sufficiently prejudicial to require reversal of the conviction. In any event, the cumulative effect of all the errors was substantially to prejudice the defendant's right to a fair trial, and accordingly his conviction must be reversed.

ARGUMENT

We have recounted the course of the trial at some length, for two reasons: first, to provide a context in which to evaluate the errors which we allege; and second, to show just how close a case this was, and why any error must necessarily have been prejudicial to the defendant. The government's sole evidence that Cross was one of the robbers was the testimony of three persons: a victim, who did not see the robbers' faces, and whose identification was so weak that the judge urged government counsel not to rely on it; and two-self professed "accomplices", both with long criminal records, both under the influence of narcotics on the night of the robbery, one of whom was psychologically disoriented, had a "tendency to prevaricate", and had been promised consideration on her own indictment if she testified against Cross, and the other of whom had previously signed an affidavit flatly contradicting her present testimony. [1]

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[1] The judge in his charge to the jury, noted that "there is a serious problem of credibility involved here for you to resolve because of the conflict in the testimony." (Tr. 336). Likewise, this Court, in its opinion reversing the original conviction, noted the close nature of any case which depends upon the credibility of two witnesses such as these. 335 F.2d at 991, n. 14.

For convenience we have divided the argument into four sections, in which we present the errors which we believe occurred.

First, we show that it was error to permit evidence showing that Cross had committed prior crimes and otherwise indicating that he was a man of bad character; and that that error was further compounded by the judge's failure to charge that Cross' prior history and defects of character may not be considered as evidence that he committed the crime of which he was charged.

Second, we show that it was error to permit the government to smuggle into the record, and thereafter to rely on, hearsay testimony that Mrs. Peyton, whose testimony had been impeached by a prior inconsistent statement,had made prior statements consistent with her testimony.

Third, we show that government counsel's closing argument contained substantial misrepresentations of the evidence in the record and relied on evidence not in the record, and that these may have affected the verdict.

Fourth, we show that it was error for the judge to refuse to charge that the jury should consider, in weighing the credibility of accomplice testimony, that the witness had been promised consideration on her own indictment if she agreed to testify against the defendant.

I. THE DISTRICT COURT ERRED IN PERMITTING EVIDENCE THAT DEFENDANT IS A PERSON OF BAD CHARACTER AND, HAVING PERMITTED SUCH EVIDENCE, IN FAILING TO CHARGE AS TO THE LIMITED PURPOSE FOR WHICH IT WAS ADMITTED.

The defendant did not take the stand, and his credibility therefore was not in issue. Nor did he introduce any evidence designed to show good character. It is well settled that in these circumstances the government normally may not introduce evidence that the defendant is a person of bad character who has committed crimes in the past. Michelson v. United States, 335 U.S. 469, 475-76 (1948); Drew v. United States, 331 F.2d 85, 89-90 (D.C. Cir. 1964). As Mr. Justice Jackson stated the rule in Michelson:

> "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests defendant with a presumption of good character ... but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts may logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice

> one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." (335 U.S. at 475-76).

There is, of course, an exception to this rule of non-admissibility, where evidence is otherwise highly relevant in proving an element of the crime charged. We discuss this exception infra.

In the present case, the government introduced evidence impugning defendant's character at two points in the trial. The first was during its redirect examination of Hazeltine Price Peyton. On cross-examination, Mrs. Peyton had admitted signing an affidavit prior to trial which totally contradicted her trial testimony implicating Cross in the robbery. Defense counsel allowed her to state that she had signed the affidavit because in fear of defendant, who, she said, had threatened her if she refused (Tr. 116, 120). Government counsel, anxious to assure that Mrs. Peyton's explanation would sound convincing to the jury, elicited the following testimony on redirect (Tr. 137-38):

> "Q. Now why did you say this?
>
> "A. Because of fear, out of fear.
>
> "Q. Fear of whom?

"A. Of him.

"Q. Now why did you have fear of Cross?

"A. Because certain things have happened in the past.

"Q. What things have happened in the past?

"MR. CONNELL: Objection, Your Honor.

"THE COURT: Overruled.

"THE WITNESS: Well, little incidents where the other -- Kay Foster and myself were one night, he had beaten us and everything.

BY MR. SIDMAN:

"Q. Beaten you both up?

"A. Yes, sir, and it's hard to explain.

"Q. You were afraid?

"A. Yes.

"Q. Were you afraid for your own safety?

"A. For my own health, yes.

"Q. For your own life?

"A. Yes."

By this questioning, government counsel attacked the character of defendant in two respects. First, he introduced evidence that defendant had committed two assaults on women. Second, by a series of leading questions,he escalated the magnitude of those assaults from "little incidents", as the witness had first described them, to incidents putting her

in fear of her life.

Government counsel reminded the jury of this testimony in his summation, and added his own evaluation that to fear the defendant was "justifiable" and "legitimate":

> "And why did she sign it? You heard her testimony. He threatened her. I was in fear of my life, he had already beaten me up once, he had beaten up Kay Foster, and I was afraid of him. And justifiably so, ladies and gentlemen." (Tr. 301; emphasis supplied).
>
> * * *
>
> "[T]hat affidavit was extracted from her under fear of harm from this defendant. And again I say, a legitimate feeling." (Tr. 302-03; emphasis supplied).

The second point in the trial at which defendant's character was impugned was during the government's cross-examination of Floyd McIntosh (Tr. 226-27):

> "Q. When was the first time you met Kay Foster?
>
> "A. Back in about '58, either '59 or '60.
>
> "Q. And when before today was the last time before today that you have seen her?
>
> "A. When I was arrested in Winston-Salem, North Carolina.
>
> "Q. Now you were arrested in Winston-Salem North Carolina when you were in an automobile, weren't you?
>
> "A. Yes, I was.
>
> THE COURT: Are you talking about just an arrest or conviction?

"MR. SIDMAN Arrest, Your Honor. I am not trying to impeach him on it, Your Honor.

"MR. O'CONNELL: I object to it.

"THE COURT: He already testified about an arrest.

BY MR. SIDMAN

"Q. Whose car were you in?

"A. It was Harold's car.

"Q. Harold Cross, the defendant?

"A. Yes.

"Q. And who was in the car?

"A. Kay, Kay Foster, Hazel, fellow named James Brown, a fellow named James Moran" (Tr. 226-27, emphasis supplied).

Government counsel thus elicited testimony that people have been arrested while driving with defendant in his car, hundreds of miles from home.[/]

What car McIntosh had been arrested in was totally irrelevant to any issue in this case. Its introduction in evidence

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[/] It is possible to interpret McIntosh's last answer as indicating that Cross was not in the car at the time of the arrest. The jury was hardly likely to interpret it so, however, nor is it likely that McIntosh intended to exclude Cross. He had already testified regarding himself and Cross, and so he included neither in his list of additional occupants.

served only one purpose: to impugn defendant's character. As such, it falls squarely within the exclusionary rule of Michelson and Drew, and its admission was error.

We do not argue that Hazel Peyton's testimony about the beatings was similarly irrelevant. That she signed the affidavit out of fear was a relevant circumstance to be weighed by the jury in determining whether her contradictory trial testimony was credible. The basis for her fear was likewise relevant. But relevance alone is not sufficient to bring the testimony within the exceptions to the exclusionary rule. For a number of reasons, it was error to admit evidence of the beatings in this case.

First, evidence impugning a defendant's character, even if relevant, may be introduced only if "necessary or important in the proof of the government's case." Frank v. United States, 104 U.S. App. D. C. 384, 262 F.2d 695,697 (1958):

> "Although sensational and shocking evidence may be relevant, it has an objectionable tendency to prejudice the jury. It is, therefore, incompetent unless the exigencies of proof make it necessary or important that the case be proved that way. There was no such need here."

See also, Judge Stephens' concurring opinion in Martin v. United States, 75 U.S. App. D.C. 399, 187 F.2d 865, 867(1942) (recently described by this Court as "perhaps the leading

authority in this jurisdiction" on the admissibility of evidence of prior crimes, Drew, supra, 331 F.2d at 89, n.7):

> "[I]f ... there is in a case ample evidence to establish a fact in issue without recourse to evidence concerning other offences so that the latter evidence would be but cumulative, then, even if it be fairly within one of the exceptions [to the exclusionary rule], the court ought to exclude it because, since it is but cumulative, its introduction could hardly have any substantial effect except that of complicating the issues and poisoning the minds of the jurors and this even if a cautionary instruction were given ... [C]ases will occur in which the necessity of evidence of other crimes is so slight and the prejudicial effect so great that to admit the evidence would be beyond the proper limits of discretion and within the field of error."

Here, Mrs. Peyton had already testified that defendant had threatened her if she did not sign the affidavit, and that she signed out of fear. It was merely "gilding the lily" to have her amplify the basis of that fear to include the prior beatings. And the prejudice to the defendant, who was, after all, being tried for another crime of violence, is evident. Cf. Awkard v. United States, No. 18,723, slip. opin, pp.6,7 (June 23, 1965).

Second, this testimony did not go to proving any element of the offense charged, but merely to bolstering the credibility of a witness whose testimony had been impeached. It is generally recognized that evidence of prior crimes is

admissible only where relevant to prove an element of the crime itself. Drew, supra, 331 F.2d at 90. In this case, we submit, the evidence of prior beatings was so peripheral to proof of the crime itself, and so prejudicial to the defendant, as to fall on the "inadmissible" side of the test set forth in Harper v. United States, 99 U.S. App. D. C. 324, 239 F.2d 945, 946 (1956):

> "Thus analyzed, the rule is that evidence of other offenses is admissible when substantially relevant to the offense charged; inadmissible when its relevance is insignificant; and, in borderline cases, admissible when its relevance outweighs the undue prejudice that may flow from it, but otherwise inadmissible."

We have shown thus far that the evidence of prior beatings should have been excluded for two distinct reasons: first, that it was merely cumulative of Mrs. Peyton's other testimony of her fear; and second, that it related to an issue peripheral to proof of the elements of the crime charged. There is still a third reason why the evidence should have been excluded. This court has held that evidence of prior crimes for which a defendant has been neither arrested nor convicted should be excluded, even if satisfying all other tests of admissibility, unless it is "substantially corroborated". In Hansford v. United States, 112 U.S. App. D.C. 359, 303 F.2d 219 (1962), it was held error to permit a police officer to

testify to prior crimes of the defendant, even though satisfying all other tests of admissibility, because:

> "There was no arrest for the alleged prior offense and thus no indictment or conviction. In these circumstances the defendant had no opportunity to defend against this other charge and no means of rebutting it, save by his own unsupported testimony in denial of the officer's testmony. In this particular factual situation we hold that the testimony of officer Hutcheson as to the September 1959 incident, not having been corroborated by the production of a contemporaneous report or otherwise substantially corroborated, was so prejudicial to the accused in his defense of the charge on trial as to outweigh the probative value of the testimony ..." (303 F.2d at 226).

Here, Mrs. Peyton's testimony concerning the beatings was totally uncorroborated. And the only way defendant could have rebutted it would have been by "his own unsupported testimony in denial of [her] testimony". Indeed, here the injury to the defendant is much greater than it was in Hansford. Whereas defendant here did not wish to take the stand in defense of the charge for which he was being tried, the defendant in Hansford did take the stand and evidence of his prior convictions had already been introduced. 303 F.2d at 221. The prejudicial effect of admitting evidence of still another crime was far less than here, where there should have been no evidence of defendant's criminal past. Moreover, the interjection of testimony that he had committed other crimes in this

case presented defendant the "Hobson's choice" of letting them go unanswered, or of taking the stand to answer them and thereby opening himself to examination on the crime for which he was charged as well. It was precisely the same dilemma (albeit arising in a different context) which led to the reversal of defendant's first conviction in this case. Cross v. United States, _____ U.S. App. D.C. _____, 335 F.2d 987 (1964).

We have shown that it was error -- and obviously prejudicial -- to permit testimony of defendant's bad character and prior offenses. But even if this evidence were properly admitted, the conviction must be reversed. For the judge failed to give the mandatory charge that this evidence was admitted for a limited purpose, and was not probative of defendant's guilt of the crime for which he was charged.

> "When proof of other crimes is admitted, the Court must instruct the jury as to the limited purpose of its admission, and that they must confine its use to that purpose. The failure to so instruct the jury is reversible error if prejudicial." 1 Wharton's Criminal Evidence §248, p. 566. (Emphasis supplied)

See also Awkard v. United States, No. 18,723 slip opin. at p.3 (June 3, 1965); Martin v. United States, 75 U.S. App. D.C. 399, 187 F.2d 865, 867, 871-72 (1942) (concurring opinion of Judge Stephens).

In the present case counsel for the defendant did not request

that the cautionary instruction be given, although he had objected to the introduction of the "bad character" evidence of both Mrs. Peyton and Floyd McIntosh. As Judge Stephens noted in Martin, 187 F.2d at 870-71, in some jurisdictions it is reversible error to omit the instruction whether or not requested by the defendant, while in others it is reversible error only if denied after request by the defendant. Judge Stephens ventured no opinion as to which rule should be applicable in the District of Columbia, nor have we found any subsequent case addressed expressly to this problem. We submit that the introduction of such evidence without appropriate instructions to the jury is so prejudicial that the charge should be mandatory, whether or not requested by counsel for defendant. At the very least, under standards analagous to the "plain error" test of Rule 52(b), the failure to give the charge in this case should be found to be reversible error. This was a very close case, the defendant was being tried for a crime of violence, and the prior crimes admitted in evidence were likewise crimes of violence. The jury was permitted (because not instructed otherwise) to consider this evidence as demonstrating defendant's propensity to commit violent acts, and to weigh the prior crimes as evidence that the defendant committed the crime of which he was charged. "[T]he likelihood that juries will make such an improper inference is high,"

Drew, supra, 331 F.2d at 89-90. It was "plain error" to permit the jury to make that inference here.

II. THE DISTRICT COURT ERRED IN PERMITTING HEARSAY TESTIMONY THAT MRS. PEYTON HAD MADE PRIOR STATEMENTS CONSISTENT WITH HER TESTIMONY IN THIS CASE.

One of the critical issues in this case was the credibility of Mrs. Peyton. She testified on direct examination that she accompanied defendant to the church, and that he participated in the robbery. But she admitted on cross-examination that she had signed an affidavit in which she denied any knowledge of the crime or its perpetrators. On redirect examination, government counsel sought to elicit testimony that she had previously made statements consistent with her present testimony, and inconsistent with the affidavit. The judge refused to permit this testimony. His ruling was correct.

> "The weight of authority is to the effect that when the credibility of a witness is assailed because, on some former occasion, he has made statements that differ from his statements under oath at the trial, his sworn testimony may not be corroborated by proof that on other occasions and at other times his statements were in harmony with his testimony." 3 Wharton's Criminal Evidence, §969, p. 430 (12th Ed. 1955).

Nonetheless, the court permitted the jury to know of this inadmissible evidence at a later point in the trial. Mr.

Lefstein, a defense witness, had testified that he interviewed Mrs. Peyton at D. C. Jail, and that she told him that the contents of the affidavit were true. On cross-examination, over the objection of defense counsel, the court permitted government counsel to ask Mr. Lefstein whether he was "aware of the fact that Mrs. Peyton had given a statement to the authorities which was wholly contradictory and inconsistent with the affidavit." Mr. Lefstein replied "I had read where she had given such a statement" (Tr. 207-08).

This exchange had two vices: first, it permitted into evidence the information which had previously properly been excluded; second, it permitted this information through hear-say. Mr. Lefstein had not been present when Mrs. Peyton's purported statement was given to the authorities; he had only "read" that she had given such a statement.

The error was compounded in the closing argument of government counsel. There, Mrs. Peyton's affidavit was described as in "obvious contradiction" with her prior statements (Tr. 301).

_/ Nor can this be considered as falling within the "state of mind" exception to the hearsay rule. For while the question was put in terms of Mr. Lefstein's "awareness", government counsel argued to the jury on the assumption that the existence of Mrs. Peyton's prior consistent statements was a part of the record (Tr. 301).

The admission of Mr. Lefstein's testimony on this point was obviously prejudicial to the defendant. Mrs. Peyton's testimony had been seriously impeached. The jury, which had to decide which of her stories to believe, could not help but be influenced by the knowledge that she had testified before consistently with her trial testimony.

III. PREJUDICIAL ERROR OCCURRED WHEN GOVERNMENT COUNSEL, IN HIS SUMMATION, MISSTATED THE EVIDENCE IN THE RECORD IN THREE CRITICAL RESPECTS TO THE DISADVANTAGE OF THE DEFENDANT.

We shall show in this section that the summation by government counsel misstated the evidence in the record in three critical respects, and thereby prejudiced defendant's opportunity for a fair trial. Before we do so, however, we want to make perfectly clear that we are not charging that there was any deliberate misconduct. We are confident that the misstatements reflected nothing more than understandable lapses of memory of the evidence introduced in a trial spanning seven days. (The trial began on December 2, 1964; the jury retired to consider its verdict on December 8).

The issue here is not the conduct of the prosecutor, however, but the fairness of the trial. If the jury was misled or confused on critical issues by erroneous statements,

defendant has been denied a fair trial, regardless of the good faith of all participants. On this basis, we recount the erroneous statements made in government counsel's summation.

(1) Kay Foster testified that she had been promised favor or consideration on her own indictment if she would testify against Cross (Tr. 158). But government counsel, in his summation stated:

> "Now it may be argued to you that some sort of promise was made or implied to either Kay Foster or Hazeltine Price. I asked them directly, and without equivocation at all, whether or not any promise of any kind was made to them by the police, by the law enforcement authorities, by me or by anyone from my office, and they said no promises.
>
> "And ladies and gentlemen, you can believe that testimony. It wasn't contradicted, it wasn't impeached at all. No promises..." (Tr. 300; emphasis supplied).

(The confusion created by this statement was later compounded by the judge's refusal to charge that the jury should consider, in weighing the credibility of accomplice testimony, promises of consideration made to the accomplice. We deal with this question in Section IV of this brief).

(2) The two proprietors of the second tourist home referred to in the testimony of Mrs. Peyton and Miss Foster testified that Cross, Jackson, Mrs. Peyton and Miss Foster

were guests there on the night of the robbery. On cross-examination, however, they admitted that their records do not show Cross to have been there, although they knew Cross personally at the time and were required by law to register all guests (Tr. 175, 183-84). But government counsel, in his summation stated:

> "Mrs. Burton and Mr. Chase of the tourist home also testified that in the night in question, the early morning hours of February 24, this defendant and John L. Jackson and two women came in and stayed for a period of time and they had observed their records to determine whether or not that was so. They verified it before their testimony."(Tr. 297, emphasis supplied).

(3) The court had properly refused to permit introduction of prior statements of Mrs. Peyton consistent with her trial testimony, and contradicting the impeaching affidavit. We have already shown that government counsel managed to get before the jury the fact of the existence of such statements (though not the statements themselves), in a roundabout fashion and that it was error to let him do so (Section II, supra). That error was grossly compounded, however, by government counsel's statement in summation that Mrs. Peyton's affidavit was in "obvious contradiction" with her prior statements (Tr. 301). The jury was led to believe -- contrary to fact -- that Mrs. Peyton's prior statements were in evidence, to be weighed in determining her credibility.

Defense counsel, in his summation, correctly stated the record evidence on the first two of these three issues (Tr. 317, 308-09). But defense counsel's attempted repair could not erase the prejudicial effect of the misstatements. The jury was left with a new credibility question -- which lawyer to believe -- on issues which were not really in dispute. Miss Foster had testified that she received a promise of consideration; the records of the proprietors of the tourist home did not support their testimony, indeed they contradicted it; and Mrs. Peyton's prior statements were not in the record. Much of this testimony had occurred several days before the summations. The statements of counsel were fresher in the jurors' minds than the statements of the witnesses. At the least, the jurors must have been confused; and if they held government counsel in high regard, and relied on his summation, they were affirmatively misled.

The issues on which the jurors were confused or misled were critical to the case. Indeed, the government's case stood or fell with the credibility of Miss Foster and Mrs. Peyton. The promise made to Miss Foster was a major item in defendant's arsenal of impeaching evidence. The prior consistent statements of Mrs. Peyton -- if the jury believed they were in evidence -- served to bolster a witness whose testimony

had been impeached by several witnesses. And the testimony of the proprietors of the tourist home was heavily relied on by government counsel as the one bit of outside evidence which seemed to corroborate at least a portion of the accomplices' testimony. (Tr. 297-98; 327-28).

This Court has noted that the prejudicial effect of misstatements by government counsel "depends, in good part, on the relative strength of the Government's evidence of guilt". Jones v. United States, _____U.S. App. D.C._____, 338 F.2d 553, 554 n.3 (1964). We submit that on the "paper-thin" evidence of guilt in this case, as in Jones, the error was prejudicial, and the conviction should be reversed.

> "[W]e are not in a position to say, in a case as paper-thin as this one appears to be, that the suggestions contained in the opening statement and in the questions were not responsible, in some degree, at least, for the convictions in this case." Jones, supra, 338 F.2d at 554.

IV. THE DISTRICT COURT ERRED IN REFUSING TO CHARGE THAT THE JURY SHOULD CONSIDER, IN WEIGHING THE CREDIBILITY OF ACCOMPLICE TESTIMONY, THAT AN ACCOMPLICE HAS RECEIVED A PROMISE OF CONSIDERATION ON HIS OWN INDICTMENT IF HE WILL TESTIFY AGAINST THE DEFENDANT.

All jurisdictions recognize that an accomplice's testimony is to be viewed with suspicion. "The testimony of an accomplice is apt to be highly colored and biased. Moreover, it is to be expected that an accomplice may, or has good reason

to, place his own welfare and freedom above that of the defendant." 2 Wharton's Criminal Evidence §445, pp. 222-223 (12th Ed. 1955). "[T]he accomplice is in a position to gain favors from the government by his testimony." Lyda v. United States, 321 F.2d 788, 794 (9th Cir. 1963).

In some jurisdictions the suspicion of accomplice testimony has hardened into a fixed rule that a defendant may not be convicted on uncorroborated accomplice testimony. 2 Wharton's, supra, p.222. In the District of Columbia, a defendant may be convicted on uncorroborated accomplice testimony. But when accomplice testimony is admitted the defendant is entitled to a charge explaining the suspect nature of the testimony, the need to act upon it with great caution, and the dangers of relying on it to convict. Freed v. United States, 49 App.D.C. 392, 266 F.1012(1920); Egan v. United States, 52 App. D. C. 384, 287 F. 958, 964-66 (1923); Bishop v. United States, 100 U.S. App. D. C. 88, 243 F.2d 32, 33 (1957). See also Williamson v. United States, 332 F.2d 123, 130-33 (5th Cir. 1964).

In this case, the judge charged the jury that accomplice testimony must be acted upon with caution (Tr. 343-44)./ He did not, however, tell the jury why this is so. It is doubtful that a jury could properly apply the cautionary charge

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/ The charge was so perfunctory that government counsel did not hear it (Tr. 353).

unless it knows that the danger in such testimony is the accomplice's motivation to preserve his own freedom at the expense of the defendant's.

The need for such an explanation was particularly acute here, because one of the accomplices had admitted receiving a promise of consideration from the government in exchange for her testimony (Tr. 158). Defense counsel asked for a charge that this promise of consideration must be weighed in determining the accomplice's credibility (Tr. 353-54). The judge refused stating that this was a matter for "argument". (Tr. 354).

We respectfully submit that this was error. In view of the suspect nature of accomplice testimony, the jury must consider evidence that the accomplice is testifying in exchange for a promise, and accordingly should be instructed to do so. The fact that an accomplice testifies under a promise of immunity is a matter that affects his credibility, and is consequently to be considered in weighing his testimony." 2 Wharton's Criminal Evidence, §445, pp. 223-224 (12th Ed. 1955; emphasis supplied). See also Territory v. Chavez, 8 N.M. 528, 45 P. 1107, 1110 (1896). CF. People v. Grove, 284 Ill. 429, 120 N.E. 277, 281 (1918).

It is clear that the denial of defendant's requested charge was prejudicial. Kay Foster's testimony was critical to the government's case, especially in light of the damaging

impeachment of the government's other key witness. The jury had already been confused by government counsel's erroneous statement, in his summation, that Miss Foster had denied receiving any promises. In the absence of the requested charge, the jury may well have failed to apply the appropriate caution in evaluating her testimony.

V. WHATEVER THE PREJUDICIAL EFFECT OF EACH OF THE ERRORS CONSIDERED INDIVIDUALLY THEIR CUMULATIVE EFFECT WAS PREJUDICIAL AND REQUIRES REVERSAL OF THE CONVICTION.

We have shown that a number of errors occurred in the conduct of the trial, and we have argued that in a "paper-thin" case such as this was each error considered individually requires reversal. We wish only to note that, whatever the Court's estimate of the prejudicial effect of each of these errors considered separately, there can be no doubt that their cumulative effect was substantially to prejudice the defendant's right to a fair trial, and accordingly his conviction must be reversed.

CONCLUSION

For the reasons set forth in this brief, the judgment of conviction should be reversed.

Respectfully submitted

Counsel for Defendant
(Appointed by this Court)

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347-5527

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,270

HAROLD S. CROSS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
BARRY SIDMAN,
EDWIN C. BROWN, JR.,
Assistant United States Attorneys.

C.R. No. 470-62

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1. The District Court was correct in permitting a witness to explain, on redirect examination, certain prior inconsistent out of court statements with which she had been confronted on cross-examination.

2. The District Court was correct in permitting testimony that Mrs. Peyton had made prior statements consistent with her testimony at the trial.

3. An inadvertent mistatement of evidence in closing argument to the jury constitutes no error where the matter is corrected by defense counsel and cautionary instructions are given by the court.

4. Where accomplices are utilized as prosecution witnesses, it is sufficient if the jury be advised that their testimony should be received with caution.

INDEX

TABLE OF CASES

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,270

HAROLD S. CROSS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On February 23, 1962, approximately 10:30 P.M. Father Thomas Vincent Cantwell, pastor of the Church of the Incarnation, 880 Eastern Avenue, D.C., was in the church rectory along with Father Carney where they lived (Tr. 63). Both he and Father Carney had been watching television in the former's study and at about 10:45 Father Cantwell retired for the night. At approximately 11:00 P.M. he was awakened by the ringing of the doorbell. The church rectory was equipped with an inter-

com system from the front door to Father Cantwell's study. As he got up to use the intercom in his study (Tr. 64) he heard a movement in the downstairs corridor. Thinking one of the other priests was answering the door he went back to bed. Shortly afterwards he heard an outcry which sounded like a frightened "oh" or "no". Father Carney then called to him from the second floor corridor telling him to get up, that he needed his help. Fearing that Father Carney had taken ill he indicated that he was coming right out, when suddenly he heard a voice at his door stating "Get up, I want to talk to you" (Tr. 65). He answered the voice that he would put on his trousers and come out and speak with whomever it was. But the voice responded, "Get up the way you are". At this time the light went on in his study and he observed a man standing at the door near the foot of his bed. His face was covered and he was brandishing a gun. Father Cantwell then came out of his bedroom and went into the study where he observed Father Carney standing over on the side. There was another man standing near him and he too had his face covered and was carrying a gun. The man next to Father Cantwell demanded money. Father Cantwell agreed to give it to him but asked him to be careful. They then proceeded to the closet whereupon, after removing several metal boxes, the bandits took approximately $760.35 consisting of bills, change and an eight dollar check. One of the intruders then demanded Father Cantwell's personal money, went to his bedroom and removed his billfold, change purse, watch and approximately $30.00 in cash. After yanking out the telephone the intruders then left (Tr. 66-70) and the police were subsequently called.

During the course of the trial Father Cantwell identified appellant as the person who took his watch, money and pulled out the phone (Tr. 74-75).

The Government introduced witnesses to establish further that on the night in question (Feb. 23, 1962) the appellant Cross, along with one John L. Jackson, Kay Foster

and Hazeltine Peyton, drove to the vicinity of Eastern Avenue to a church (Tr. 99, 143). That during the ride, Cross discussed the fact of there being money in the church (Tr. 143). After parking the car Cross, along with Jackson, went into the church and then returned about fifteen minutes later. Both had guns and were wearing stocking masks on their faces (Tr. 144-145). They were carrying some envelopes, papers, metal boxes and other miscellaneous items (Tr. 144). The foursome then proceeded to a tourist home on Monroe Street. They left shortly after counting and dividing the money (Tr. 145-146). After disposing of the metal boxes they proceeded to a second tourist home where they spent the night (Tr. 147-148, 182-183). The next morning they returned to the bridge where they had disposed of the boxes, retrieved one of them and then later disposed of it in a sewer (Tr. 153-154). This latter metal box was subsequently retrieved by the police (Tr. 155, 186-187).

On remand after a prior appeal appellant was convicted of robbery on March 8, 1965. This second appeal followed.

STATUTE INVOLVED

Title 22, District of Columbia Code, Section 2901, provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

SUMMARY OF ARGUMENT

I

When inconsistent statements out of court are proved on cross examination, the witness has a right to be per-

mitted to explain that inconsistency on redirect. In the absence of a request for a charge to the jury on the limited purpose of such testimony where it involves acts of violence on the part of the accused, a failure to so instruct does not constitute plain error.

II

Where a witness's testimony is attacked as a recent fabrication or stemming from some bad motive or interest, it is proper to show that the witness made similar statements before the motive existed.

III

Such statements made by government counsel in closing argument to the jury as were erroneous were clearly inadvertent. That defense counsel quickly corrected the matter and the jury was cautioned by the court, must be deemed to have cured the error if it could be considered such.

IV

Where accomplices are used as prosecution witnesses, it is sufficient if the court instructs the jury that while as a matter of law they could convict upon the testimony of an accomplice, such testimony should be received with caution and scrutinized with care.

ARGUMENT

I. The court properly permitted the witness to explain on redirect examination her prior inconsistent statements.

(Tr. 114-121, 137, 226-227)

Appellant argues that the government was permitted to introduce evidence of bad character on his part and the commission of other violent crimes in the past. What

he truly objects to however, is that the witness involved was afforded an opportunity to explain and avoid the effect of an affidavit brought out on cross-examination which tended to discredit her damaging testimony against him. The witness, Hazeltine Peyton, testified on direct examination that she was with appellant in the vicinity of the robbery at or about the alleged time of commission. She further testified regarding certain activity on his part and others subsequent to the commission of the robbery which were highly demonstrative of his guilt. On cross-examination however, defense counsel introduced an affidavit which she admitted having signed and containing therein matters completely contrary to her testimony on direct (Tr. 114-121). On redirect government counsel inquired as to the circumstances of her execution of the inconsistent affidavit, whereupon she replied that she had signed the document out of fear; that appellant had beaten her in the past (Tr. 116-137). This was the extent of the "bad character" and "other violent crimes" evidence of which appellant complains.

Under the circumstances here described it was quite proper for the court to receive evidence of prior violence between the parties as it was directly connected with the affidavit produced by appellant. It was highly relevant in determining her mental disposition at the time of the signing of the affidavit. This did not involve the introduction of evidence of evil character to establish a probability of appellant's guilt. Its purpose was quite evident in rebutting the issue of credibility raised by appellant's counsel and pursued throughout his entire cross-examination. Nor was the fact that appellant had assaulted the witness on a prior occasion of such a sensational and shocking nature as to unduly prejudice the jury. When inconsistent statements out of court are proved on cross, the witness has a right to be permitted to explain that inconsistency on redirect.[1] In conducting redirect examina-

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[1] *Villeneuve* v. *Manchester St. R. Co.*, 73 N.H. 250, 60 A. 748 (1905); *Long* v. *F. W. Woolworth Co.*, 232 Mo. App. 417, 109 S.W. 2d 85 (1937).

tion the practice is uniform that the party's examination is normally limited to answering any new matter drawn out in the next previous examination of the adversary. Indeed, reply to new matter drawn out on cross-examination is the normal function of the redirect, and examination for this purpose is a matter of right.[2]

The evidence that a witness had been arrested in appellant's car made no allusion to appellant himself and conveyed no image of his character whatsoever. Indeed the testimony revealed that the arrest spoken of took place in North Carolina (Tr. 226) and that appellant was not among those present at the time (Tr. 226-227).

In view of the foregoing appellee submits that a receipt of evidence tending to explain a witness' prior inconsistent statements is proper; that, in the absence of a request for a charge to the jury on the limited purpose of such testimony where it involves acts of violence on the part of an accused, a failure to so instruct does not constitute plain error. "Plain error" means precisely that, and "exceptional circumstances" must in fact be exceptional. See *Silber* v. *United States*, 370 U.S. 717, 718 (1962). Counsel's attempt to make plain error from any error that can be shown to be of a prejudicial character would make the rule almost meaningless. Error which is not prejudicial at all is not a ground for reversal even if objection has been fully noted.[3]

II. There was no smuggling into the record of prior consistent statements.

(Tr. 132-133, 138-139)

It is noted that appellant erroneously states the trial judge had ruled evidence of prior consistent statements on the part of the witness Kay Foster inadmissible. This is not so. The court effected no preclusion whatever on

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[2] *Gray* v. *Metropolitan St. R. Co.*, 165 N.Y. 457, 59 N.E. 262 (1901).

[3] F.R. Crim. P. 52(a).

the oral testimony of other matters tending to support the witness' credibility. What he did preclude was the admission of an alleged written statement of the witness with regard to which there had been no impeachment (Tr. 138). The record makes quite clear that this ruling was made primarily, if not solely, because the witness was present and able to testify concerning the prior consistent matters contained therein (Tr. 138-139).

Further, it is clear that appellant's counsel was trying to impute to the witness a motive for misrepresentation; namely, to absolve herself from criminal prosecution (Tr. 132-133). Where opposing counsel imputes to the witness a design to misrepresent from some motive or interest, it may be shown in order to repel such imputation, that the witness made a similar statement before the supposed motive existed or before the motive of interest prompted him to make a different statement of the facts.[4]

Appellee submits that testimony regarding prior consistent statements of Hazeltine Peyton would have been entirely proper and as such the brief reference thereto made by a defense witness on cross-examination constituted no error.

III. Government counsel's argument to the jury constituted no error.

(Tr. 133-139, 158, 175, 183, 226-227, 297, 300, 317, 322)

Appellant complains of certain statements made to the jury by government counsel. His objections are that counsel (1) represented that both female witnesses denied receiving any promise of consideration in return for testifying; (2) represented that certain tourist home records verified appellant's overnight stay on the night of the robbery; (3) represented that Mrs. Peyton's affidavit was contrary to prior statements made by her.

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[4] *Barkly* v. *Copeland*, 74 Cal 1, 15 P. 307 (1887); *Hewitt* v. *Corey*, 150 Mass. 445, 23 N.E. 223 (1890); *Lyke* v. *Lehigh Valley R. Co.*, 236 Pa St. 38, 84 A. 595 (1912).

On this phase of the matter several observations are pertinent. In the first place, counsel for the defense cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial. See *Crumpton* v. *United States*, 138 U.S. 361, 364 (1891). Of course appellate courts "in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings."[5] However, the exceptional circumstances which call for an invocation of that rule are not present here. Government counsel, in the heat of his closing argument did state that both of the female accomplices testified that they were given no promises (Tr. 300), whereas, in fact, the witness Kay Foster testified that she was told that "they would see what they could do." (Tr. 158). But this did not constitute a mistatement of the evidence going to the essential elements of the offense. It involved only the weight to be given to the testimony of the witness. Quite obviously counsel was thinking solely of his interrogation with Hazeltine Price for the record reveals that she was the only one as to whom he made inquiry concerning promises of any kind, and her answer was in fact no (Tr. 133, 139). Further, the matter was quickly corrected by defense counsel who in his closing argument commented on that very point (Tr. 317, 322). The court, in its charge to the jury advised them that they were to rely solely on their own recollection of the testimony and not accept the argument of counsel as evidence (Tr. 334). That must be deemed to have cured the error if it could be considered such. As stated in *Dunlop* v. *United States*, 165 U.S. 486, 498 (1897)," "If every remark made by counsel outside of the testimony were ground for reversal comparatively few verdicts would stand, . . ."

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[5] *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936).

Government counsel also stated that Mrs. Burton and Mr. Chase, the tourist home proprietors, had observed their records to determine whether or not appellant and three others had come to their place of business and stayed for a period of time; that they verified it (the fact of registration) before testifying (Tr. 297). The record herein, however, is unclear as to whether the tourist home records did or did not verify the registration testified to. Both Mrs. Burton and Mr. Chase testified that the foursome involved spent the night at their place of business. Mr. Chase stated that he saw the registration cards at the last trial but didn't recall what name was used in registering (Tr. 183). Mrs. Burton testified that she didn't know who signed the register but noted that the name Cross was not used (Tr. 175). That appellant and his party may have used names other than their own does not vitiate the fact of registration however. The testimony clearly reveals that whatever names were used there was a registration of guests identified as the four involved. Thus, it cannot be conclusively stated that counsel misstated the evidence in this regard. In any event, it would be difficult to imagine that the minds of the jurors would be so influenced by such incidental statements that they would not appraise the evidence objectively and dispassionately based solely on their recollection alone. The same reasoning is equally applicable to the statement of counsel regarding prior statements of the witness Peyton.

It would appear that appellant is engaging in the much too popular pastime of scrutinizing the transcript and alleging possible errors that had not been noted before. Such matters should not be considered unless the error was of great magnitude.[6]

In view of the foregoing, appellee submits that the statements of government counsel in his closing argument constitute no prejudicial error.

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[6] *Lash* v. *United States*, 1 Cir., 221 F.2d 237, *cert. denied*, 350 U.S. 826 (1955).

IV. The court's instructions to the jury were sufficient.

(Tr. 343-344)

During the charge to the jury, defense counsel requested a charge that "if the jury believes there has been any indication of favor or consideration by the government . . . ." The court refused stating this was a matter for argument. Appellant's counsel states that trial counsel was asking that the jury should consider that an accomplice has received a promise of consideration on his own indictment in weighing his credibility. True, the gist of the conversation at the time of the request was centered around the topic of accomplices, but, there is no firm indication that this was in fact what trial counsel was requesting. Appellant's conclusion is speculative. It is just as reasonable to assume that trial counsel was about to request that if the jury believed there had been any indication of favor or consideration by the government toward any witness, that they may completely disregard their testimony. Whatever request counsel may have been going to make on the issue of accomplices however, proper cautionary instructions were given to the jury by the court which amply covered the matter (Tr. 343-344). It is sufficient if the court instruct the jury that while as a matter of law they could convict upon the testimony of an accomplice, such testimony, though competent for their consideration, should be received with caution and scrutinized with care.[7] This was done in the case at bar.

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[7] *Egan* v. *United States*, 52 U.S. App. D.C. 384, 287 F. 958 (1923); *Bishop* v. *United States*, 100 U.S. App. D.C. 88, 243 F.2d 32 (1957).

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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